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SUPREME COURT, U.S.
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No. 04-180

In The

Supreme Court of the United States

GEORGE E. BURLESON

Petitioner,

v.

HANCOCK COUNTY SHERIFF'S DEPARTMENT CIVIL SERVICE COMMISSION, HANCOCK COUNTY SHERIFF STEVE GARBER AND FORMER HANCOCK COUNTY SHERIFF RONALD PETERSON

Respondents.

On Petition For Writ Of Certiorari To The Appeals Court Of The State Of Mississippi

PETITIONER'S REPLY BRIEF

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NEW QUESTIONS PRESENTED

I-VI. Respondents rephrase a number of Petitioner's questions creating seemingly new questions that are based on inaccurate and/or incorrect facts that are not part of the record before the Court. Regardless of how Respondents couch their questions, the core issues remain before the Court.

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INTRODUCTION

Respondents' unsupported assertions in their introduction concerning an insurance crisis are false. Lawsuits against public entities have not contributed to any insurance crisis in Mississippi. Respondents claim that juries are tempted to view public entities as "deep pockets" and that recent multi-million dollar verdicts have created an insurance crisis is also patently false.

In 1993, the Mississippi Legislature passed the *Mississippi Tort Claims Act*, MCA Sec. 11-46-1 et seq. (1993), creating an exclusive remedy against the state (or any political subdivision) wherein no public employee can be held personally liable for any judgments brought arising out of the course and scope of his/her employment. Further, any award against a political subdivision was limited to a statutorily set amount of damages of only $250,000. Finally, punitive damages cannot be awarded under the act. Therefore, a multi-million dollar award against a public entity was and is impossible.

However, even if Respondents' false assertions were true, that somehow Petitioner caused an insurance crisis, the due process protections afforded Petitioner could not be ignored. Respondents allege that "under these circumstances" the due process Petitioner received was "more than sufficient to protect him." What due process? Petitioner did not receive a pre-termination hearing. This Court has held that due process entitles a public employee to a hearing before he [or she] is deprived of any significant property interest. There is no argument that termination of a twenty-year law enforcement career is a significant property interest. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985).

As recently pronounced by this Court, even a citizen-detainee seeking to challenge his status as an enemy combatant must receive notice of the factual basis for his classification and a fair opportunity to rebut allegations at a hearing prior to any deprivation. *Hamdi v. Rumsfeld*, 124 S.Ct. 2633 (2004). Petitioner, as a decorated career law enforcement officer, was given less due process than a

citizen captured on the field of battle fighting against his own county.

Respondents wish this Court to ignore fundamental law that once a state grants its citizen a property right, that property cannot be taken away without constitutionally protected and federally mandated due process. Respondents wish this Court to allow Mississippi politicians to keep their law enforcement officers in the "back of the bus" where they can continue to be treated as second-class citizens. Citizens whose rights, according to the Respondents, are not even worthy of invoking this Honorable Court's protection.

RESPONDENTS MISSTATEMENT OF THE CASE

1. Proceedings and Disposition in the Lower Courts

Respondents confess that Petitioner's statement of proceedings is generally correct. Thus, they admit that Petitioner was denied the federally mandated pre-termination hearing and was denied a timely post-termination hearing. Both hearings being procedural rights determined by this Court to be bedrock requirements of due process afforded a civil servant. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985); *Gilbert v. Homar*, 570 U.S. 924 (1997).

Respondents ask the Court to disregard Petitioner's "invective", i.e. abusive language, against those who supervise law enforcement officers. What invective? There is no abusive language contained in Petitioner's statements to this Court, only earnest and truthful statements of the sorry state of affairs concerning how law enforcement officers continue to be treated as second class citizens in Mississippi as exemplified by the very facts of this case involving Petitioner. A pattern far too often repeated throughout the state.

Respondents refer to the Southern States Police Benevolent Association as a "policemen's union." A benevolent association, by definition, is not a "union" and exists only to protect its members as it is rightfully doing so

here. Unlike a union, a benevolent association cannot strike, have the 'blue flu' or conduct other disruptive activities that might affect the public safety.

Respondents also ask the Court to disregard Petitioner's invective against its citizens who exercise their constitutional rights to sue deputies or police officers who injure them. As the Court can readily discern from review of the petition before it, there is not one statement, invective or otherwise, by Petitioner or his fellow officers, concerning a citizen's exercise of constitutional rights. The very rights Petitioner and others daily risk their lives to protect but are being denied to them due to their continued second-class citizen status in Mississippi.

As Respondents are incorrect concerning these very basic things and recite fundamental misstatements as fact, as brought to the attention of the Court above, they are also incorrect concerning Petitioner's alleged failure to properly challenge the commission's abrupt denial of cross-examination after allowing cross of only the first witness at the first hearing. The commission chairwoman, Anne Williamson (an attorney), announced at the second hearing held in January 2001 that there would be no cross-examination as follows:

Mr. Capps (Counsel for Sheriff Garber): " . . . are you saying there's not going to be any cross-examination of the witnesses by the opposing attorney?"

Ms. Williamson: "That's right. No."

Mr. Halliday: " . . . We certainly raise our objection to no cross-examination."

Ms. Williamson: "Okay. It's noted. We note your objection."

See: Transcript of Hancock County Sheriff's Department Civil Service Commission Hearing, Jan. 17, 2001, page 3, lines 3-19.

Again, contrary to Respondents' statements, Petitioner raised the issue of denial of this fundamental procedural right of confrontation at every level including during argument before the Mississippi Court of Appeals.

The Mississippi Court of Appeals acknowledged Petitioner properly raising this argument commenting that (at the post-termination hearing held on January 17, 2001): "The other side also was denied the opportunity to cross-examine witnesses." App. A, 11a.

Denial of the right to confront witnesses by cross-examination during disciplinary civil service hearings is a violation of due process as made clear by this Court. *Richardson v. Perales*, 402 U.S. 389 (1971). Respondents are well aware that they violated Petitioner's fundamental due process rights by denying his right to confront the witnesses against him. Thus, Respondents factually flawed and legally defective argument attempting to tell this Court that it cannot even consider the issue because Petitioner failed to object when the transcript of the hearing clearly reflects that he did and his objection to no cross-examination was noted but overruled and is discussed by the Mississippi Court of Appeals.

2. Respondents' Statement of Facts

Respondents admit that Petitioner's succinct and definitive statements of fact are true, disputing only part of number three. Regardless of whether, Petitioner was demoted or transferred, all testifying witnesses confirmed that Petitioner was "disciplined" by this action (demotion or transfer) and disciplined specifically for the same reason he was later terminated. This testimony was confirmed by the civil service commission calling the transfer a "disciplinary event" in its Findings of Fact. Pet. App. C, 20c.

However, Respondents after admitting that Petitioner's facts are true, then incorrectly recite and discuss those admitted facts in an attempt to discredit the Petitioner and dissuade the Court of the importance and the magnitude of the issues presented by the Petitioner for review. Therefore, Petitioner will address the Respondents incorrect version of the facts.

The False Arrests

Respondents state that the Petitioner, "personally typed out an arrest warrant, and told the seller how to file it to have the buyer arrested." If this were not such a serious matter (not only for Petitioner but all law enforcement and indeed all civil servants), this errant statement would be comical as it exemplifies the Respondents' complete lack of understanding of the inherent workings of the criminal justice system. Neither Petitioner, nor any law enforcement official, can simple type out an arrest warrant and have a complaining citizen "file it" to have another citizen arrested. It is fundamental procedure that a judicial officer must first independently review the supporting allegations of criminal conduct and then sign an arrest warrant for that warrant to be executed.

The record is clear that Petitioner did not file an affidavit alleging a crime on behalf of a complaining citizen in the first alleged false arrest and only (in fulfilling a corollary duty as a clerk) typed out an affidavit for the citizen to sign, and explained to the citizen how to present it to a judge for consideration. The citizen did so and a judge independently (Petitioner was not present) then issued an arrest warrant based on the citizen's sworn affidavit. See: Transcript of Hancock County Sheriff's Department Civil Service Commission Hearing, Jan. 17, 2001, testimony of Sheriff Ronnie Peterson at pages 7-10 and testimony of George Burleson at pages 49-51.

Contrary to Respondents assertions of liability for this and another circumstance allegedly involving a second false arrest by Petitioner, thus causing an insurance crisis, neither the Petitioner nor the Respondent Sheriffs or their political subdivision had little if any liability as Mississippi law has certain statutory exemptions for a governmental entity and its employees acting within the course and scope of their employment or duties. The exemptions are numerous under the specific circumstances delineated in the Mississippi Code Annotated. The statutory exemptions to liability applying to the two minor claims involving Petitioner are:

1. "Arising out of a legislative or judicial action or inaction, . . . or judicial nature;" MCA Sec. 11-46-9(1)(a) (1993)
2. "Arising out of any act or omission of an employee of a governmental entity engaged in the performance or execution of duties or activities relating to police or fire protection unless the employee acted in reckless disregard of the safety and well-being of any person not engaged in criminal activity at the time of injury;" MCA Sec. 11-46-9(1)(c) (1993)

As an independent judicial officer signed the arrest warrant leading to the alleged false arrest and the information presented to the issuing judicial officer was presented independently by a complaining citizen, not Petitioner, no liability accrued to Petitioner nor Respondent Sheriffs or the political subdivision they represented.

In the second alleged circumstance of false arrest involving Petitioner, again no liability accrued to Petitioner nor Respondent Sheriffs or the political subdivision they represented. Contrary to the incorrect selective recitation of 'facts' concerning the second circumstance, a citizen was found in possession of stolen property, refused to release the property and was consequently arrested by Petitioner. The arrested citizen was taken directly to the sheriff's office where the sheriff released him within the hour. See Transcript of Hancock County Sheriff's Department Civil Service Commission Hearing, Jan. 17, 2001.

Regardless, any dispute as to Respondents version of the facts is not relevant, as nothing in the record documents that the arrested citizen was injured or that Petitioner acted in disregard of the citizen's safety or well being. He was merely arrested, taken to the sheriff's department and subsequently released. Under these circumstances, even assuming for argument's sake, that Petitioner's actions resulted in a mistaken or false arrest, no liability accrued due to the legislatively enacted statutory preclusion preventing such liability. MCA Sec. 11-46-9(1)(c) (1993). These two cases cited by Respondents to have caused or significantly contributed to the alleged 'insurance crisis' were both

eventually dismissed without judgment or other findings against the Petitioner.

Respondents' Version of the Discharge; The Hearings; The Civil Service Commission findings.

Respondents basically argue that Petitioner was not entitled to a pre-termination hearing if Petitioner's continued employment was detrimental to the interests of the government, i.e. the alleged "insurance crisis." While Petitioner has consistently denied any wrongdoing and demanded proof of the alleged 'crisis' from Respondents, substantial and credible proof was never provided and is not in the record of any of the proceedings below that Petitioner's actions detrimentally affected his employer. Regardless, this Court has stated that an employer perceiving a threat by continued employment of an accused civil servant may suspend the employee with pay pending a *Loudermill* pre-termination hearing. The employer may not, as Respondents did here, terminate Petitioner without a pre-termination hearing and subsequently deny him a timely post-termination hearing leaving him without income for over six months until he was first partially presented with the evidence against him. Regardless of Respondents reliance on their own pronouncements (civil service commission's findings) and that of the Mississippi Court of Appeals, this Court has held such actions violate due process. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985).

RESPONDENTS' FLAWED REASONS FOR DENYING THE WRIT

I. Respondents argue that the Petitioner received all the process due and a pre-termination hearing was not required.

Respondents assert that Petitioner has "wholly failed" to show what good additional process would have done him and as a result has no due process claim.

Respondents are incorrect that the due process due Petitioner relied solely on a *Mathews* factor analysis concerning a pre-termination proceeding. While it is true that the *Mathews* balancing factors are to be considered concerning what amount of procedural process is due concerning a governmental employee's suspension, the Court has made it abundantly clear what minimum process is due prior to an employee's termination. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

This Court's holding in *Loudermill* set forth the minimum requirements that must be followed prior to employment termination. The record clearly reflects that these procedures were not followed. Petitioner did not, prior to termination, receive the minimum required due process of:

1. Proper notice of the charges against him (in fact Petitioner was never notified of any charges against him, only that he was an 'insurance risk') (and only learned of charges of misconduct when the civil service commission was ordered by the Mississippi Court of Appeals to issue a ruling explaining Petitioner's termination).
2. An explanation of the charges and reason for his termination.
3. An opportunity to explain.

Respondents are asking this Court to ignore the minimum constitutionally required safeguards concerning termination of employment as set forth in *Loudermill* and are arguing that they should have discretion over what due process is afforded prior to termination.

This Court is well aware of the importance of a pre-termination hearing as explained in *Loudermill*. This is the only opportunity for an employee facing termination to invoke the discretion of the decision maker.

Respondents are incorrect that Petitioner has failed to show this Court what good "additional process" would have done him and assert he has no due process claim. Further, Respondents assert that even if the Petitioner

was "given 10 more hearings," the deprivation could not be shown to be "erroneous."

Certainly, with the grossly delayed and due process deficient post-termination 'hearings' Petitioner received, Respondents may be correct. However, with a proper sequence of timely hearings, both pre- and post-termination and with at least the minimum due process procedures afforded at those hearings, Petitioner may very well have been able to show that his termination was improperly based on erroneous information and incorrect legal presumptions and further that he was being punished twice for the same set of mistaken circumstances.

Respondents are asserting that this Court should replace *Loudermill* pre-termination requirements with the flexible *Homar* pre-suspension due process based upon the *Mathews* balancing factors. This Court's decision in *Homar* can be readily distinguished and does not apply to the due process required prior to termination.

Respondents repeatedly assert that Petitioner has "not shown what good additional procedures would have done him" and therefore has not made out a claim for deprivation of due process. Respondents cite no controlling authority for this incorrect legal conclusion.

This argument is specious at best as a pre-termination hearing with proper notice of the charges, an explanation of those charges and an opportunity to explain his side of the story would have afforded the Petitioner the opportunity to invoke the discretion of the decision maker in his favor. A timely post-termination hearing (within twenty days instead of over six months), that allowed full review of any evidence and confrontation of the witnesses against him, would certainly have allowed the Petitioner the opportunity to properly challenge his termination. Importantly, the commission would not have had the opportunity to repeatedly meet in secret with the adverse witnesses against him, while the Petitioner repeatedly demanded a hearing and to be properly advised of the reason he was terminated.

II. Respondents desire this Court to allow constitutional due process requirements to be ignored by the courts in Mississippi.

Respondents argue that this Court should allow the Mississippi courts to misinterpret, ignore and/or reinterpret state civil service law arguing that such interpretations are not a matter worthy of this Court.

This Court has soundly and repeatedly rejected this argument. Once a state grants a property interest to its citizens, the state cannot then take away that property without comporting with the constitutional due process protections inherent in the Fifth and Fourteenth Amendments to the Constitution as made clear by this Court. *Goss v. Lopez*, 419 U. S. 565 (1975).

This Court has held that federal due process protects civil servants such as Petitioner and that state enacted civil service rules and regulations must be followed. *Arnett v. Kennedy*, 416 U.S. 134 (1974).

III. Respondents assert that no issue of exceptional importance has been identified.

There are a number of issues of exceptional importance that have been identified including whether or not a state may ignore its own civil service rules and regulations and may ignore constitutional protections requiring pre-termination and timely post-termination due process. Further, the treatment of the Petitioner is shocking considering now that Respondents argue that a decorated twenty-year law enforcement veteran should be afforded less procedural protections than a school child or even an enemy combatant.

CONCLUSION

The extent of due process afforded public servants and law enforcement officers prior to and after termination is at issue here and this Court is urged to grant certiorari to provide appropriate guidance for lower courts to resolve existing confusion and disparity.

Respectfully submitted,

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By and through his attorney

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